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IN THE

Supreme Court of the United States

October Term, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

vs.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

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BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

Scope of this Brief.

The questions presented by this case, concerning the constitutionality and applicability of the New York Unemployment Insurance Law in respect to maritime workers, are substantially similar to those raised in the three other cases in which the Industrial Commissioner is an appellee, namely:

Matton Steamboat Co., Inc., and Conners Marine Co., Inc. v. Frieda S. Miller, as Industrial Commissioner, etc. and James R. Knowlson—October Term, 1942, No. 783.

International Elevating Company v. Frieda S. Miller as Industrial Commissioner, etc. and Joseph Bergen —October Term, 1942, No. 723.

Lake Tankers Corporation v. Frieda S. Miller as Industrial Commissioner, etc. and Jamel Sheredos— October Term, 1942, No. 813.

Our main brief in No. 783 not only sets forth our contentions in respect to the primary issues of constitutionality and interpretation in this case but also deals with the counter-arguments advanced in all four of the cases. We submit a short separate brief in this case in order to deal with matters peculiar to the case at bar.

Opinions Below.

The opinion of the Court of Appeals of the State of New York (R. 107-115) is reported in 289 N. Y. 119, and reversed the decision of the Appellate Division of the Supreme Court of the State of New York, Third Department (R. 104-105), reported in 263 App. Div. 773, which rendered no opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under §237, as amended, of the Judicial Code (28 U. S. C. A. §344).

Questions Presented.

The questions presented on the merits of this appeal are (1) whether claimant was a "member of the crew", (2) whether the application of the New York Unemploy-

ment Insurance Law to one engaged in maritime employment within the State of New York contravenes Article III, §2, of the United States Constitution and, (3) if not, whether Congress has affirmatively acted so as to deprive the State of jurisdiction to tax maritime employees.

Statement.

Appellant's statement of facts requires to be supplemented.

The findings of fact are contained in the referee's decision (R. 5-9), and have been affirmed by the Unemployment Insurance Appeal Board (R. 2-3) and by the Court of Appeals (R. 108).

Appellee Cassaretakis (hereinafter referred to as "claimant") worked aboard the dredge "Miami" from March 15 to August 15, 1939, employed by Standard Dredging Corp., Appellant. The Standard Dredging Corp. of New York, during the period March 15 to August 15, 1939, was engaged in operating the dredge "Miami" in Gravesend Bay, which is adjacent to the Borough of Brooklyn, City of New York. *It had a contract with the City of New York, Park Department, to pump material from beneath the surface of Gravesend Bay on to the land in order to fill in the shoreline and create an addition to the public highway under the jurisdiction of the Park Department.* The dredge was non-self-propelled, but moved from spot to spot in the vicinity of its operations by means of cables or spuds.

Appellant's brief (p. 6) states that the "Miami" "is a seagoing dredge, which after completing the Gravesend Bay job, made the voyage to Jacksonville, Florida, * * *." This

statement is at best a half-truth. The record shows that the only way the "Miami" "made the voyage" to Jacksonville, Florida, was by being *towed* from Gravesend Bay (R. 24).

The material excavated from underneath the waters was conveyed to land by means of pipe lines attached to the dredge, and which rested upon pontoons spaced between the dredge and the shore (R. 6).

A superintendent was in charge of the workers aboard the dredge, and although maritime titles were applied to those positions, the description of the work seems to indicate that their labors were principally with the operation of the dredging machinery and engines, as well as the incidental work connected therewith (R. 6).

Claimant's work was that of assistant cook, dishwasher and waiter, taking care of the feeding requirements of the personnel of the dredge. He slept aboard the dredge. During the last few weeks of his employment he served as a watchman while the dredge was out of operation and tied up (R. 6).

The work of the dredge in this particular instance was definitely in connection with the construction of a highway on land. It carried no cargo nor passengers. It definitely was not engaged in the general work of navigation. The personnel aboard the dredge were not reqnired to be licensed by any Federal agency (R. 7).

Unlike Knowlson, Appellee in No. 783, Appellee Cassaretakis was not a member of the crew of the dredge.

Statute Involved.

The statute involved is the New York Unemployment Insurance Law[1] (Labor Law §§500 *et seq.*). The pertinent sections of the statute in force during 1939 are annexed as an appendix to our main brief, No. 783. No question concerning the construction of the statute, as distinguished from its constitutionality as construed, is present in this case, since the holding of the Court of Appeals that it applies to the particular maritime worker is binding as a decision of state law.

> "The construction given to a statute of a State by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." (*Leffingwell v. Warren*, 2 Black, 599, 603.)

See, also:

Lloyd v. Matthews, 155 U. S. 222;
Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U. S. 673.

The reference which appellant makes (Brief, pp. 14, 15; see also Brief in No. 783, p. 6) to an early opinion of the New York Attorney General (1936 Op. Atty. Gen. 268), which was based entirely upon the supposed compulsion of the *Knickerbocker*[2] and *Dawson*[3] cases, is therefore of no present significance.

No question of inequity exists by reason of the Court of Appeals' reversal of the Attorney General's 1936 opinion, because the legislature has provided that no taxes shall

[1] L. 1935 c. 468 and as amended, effective June 3, 1939 by L. 1939 c. 662.
[2] 253 U. S. 149.
[3] 264 U. S. 219.

be collected in respect of wages paid prior to January 1, 1942 to officers or members of crews of vessels (N. Y. Laws 1943, c. 454). The claimant's right to unemployment benefits, which gave rise to this proceeding, has not been affected, however.

Summary of Argument.

The main points of law involved in this appeal are argued by us in companion case No. 783 (*Matton Steamboat Co., Inc. and Conners Marine Co., Inc. v. Frieda S. Miller, as Industrial Commissioner of the State of New York, and James R. Knowlson*). An additional point peculiar to this appeal is contained in Point V herein, namely:

POINT V.

Since Cassaretakis was not a member of the crew, the Federal Unemployment Tax Act exempting from the Federal Tax Service performed as an officer or member of the crew of a vessel is not applicable, and appellant is left with the sole argument that the State law contravenes Article III, § 2, of the Federal Constitution.

The Appeal Board affirmed the decision of the Referee (R. 3) that Cassaretakis was not a member of the crew (R. 8). The Court of Appeals in turn found that the employment of Cassaretakis "may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation," and held that Cassaretakis, although concededly engaged in general maritime employment, was not a member of the crew of a vessel on the navigable waters of the United States (R. 109). To substantiate such a finding of fact, the record discloses that Cassaretakis suited

his own convenience when he slept on board. The following testimony appears in the record (R. 14):

Q. Did you sleep at home?
A. Lots of times I go home.
Q. Did they have a place on board for you to sleep?
A. I can sleep there if I want to stay.
Q. Did you sleep aboard the dredge?
A. Yes. If I want to sleep there I can sleep there all the time.

Claimant testified that he did not have to have any certificate or license to work on board the dredge, nor did he have any seaman's papers (R. 18). When the appellant's witness, Mr. George F. Gee, was asked how the dredge was moved, he replied: "With tow boats. The Moran Towing Company" (R. 52). The witness further testified that the dredge "Miami" was not a propelled vessel (R. 60); that the dredge was not built for being a self-propelled vessel but was adaptable to go to sea and to be towed by another propelled vessel (R. 61).

The dredge carried only 25 to 30 men while being towed between locations, although it required a crew of 42 to 50 men, when it was engaged in actual dredging operations (Appellant's Brief, p. 17). In fact a crew of 12 was adequate to satisfy the navigation requirements in its "consolidated certificate of enrollment" (Ex. B, R. 27, 90A). Obviously in a crew of 12 there would be no need for a cook's helper. Even assuming that a cook on a dredge while it was being towed to the scene of new operations might be regarded as having some part in navigation, the court could properly find that a cook's helper was necessary only when additional workers were required for dredging in a particular locality. In other words, the claimant here was employed for the purpose of assisting in the

dredging of material to be deposited on shore and not for the navigation of the ship. The test of whether a worker is a member of the crew of a vessel is whether he is "naturally and primarily on board to aid in her navigation" (*South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251, 260).

In our main brief, No. 783, where Appellee Knowlson was a member of the crew, under Point IV, we argue that the State had not been ousted of its jurisdiction because of the fact that Congress had seen fit to exempt from the provisions of the Federal Unemployment Tax Act service performed as an officer or member of the crew. There Knowlson was concededly a member of the crew. In this case, however, the Court of Appeals has approved the finding of fact herein that Cassaretakis was not a member of the crew (R. 109). It must, therefore, of necessity, logically follow that the arguments of appellant concerning the legal effect of the federal exemption have no application to the instant case where Cassaretakis was not a member of the crew.

The Federal Unemployment Tax Act, in exempting services performed by an officer or member of the crew did not thereby exempt the services of all seamen. It has been held by this Court that the terms "master" or "member of a crew" are more limited than the term "seaman" (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, at 257, where the Courts also cited *International Stevedoring Co. v. Haverty*, 272 U. S. 50, and *Northern Coal Co. v. Strand*, 278 U. S. 142). In the same case this Court overruled the contention of the petitioner that a question of law was involved, and held that whether an employee is, or is not, a member of a crew turns on a question of fact, and if there is

evidence to support the finding, it is conclusive (*ibid.* at p. 257).

Appellant cites a number of cases in the lower Federal courts to the effect that a cook on various types of vessel (not including a dredge) is a member of the crew; and additional cases to the effect that a dredge is a "vessel" for certain purposes. The conclusion which appellant seeks to draw, that a cook's helper on a dredge must, as a matter of law, be held to be a member of the crew, is clearly a *non sequitur*. As this court stated in the *Bassett* case (309 U. S. at 258, 260-261):

> "The word 'crew' does not have an absolutely unvarying legal significance."
>
> "Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling."

We believe the Court of Appeals correctly disposed of this matter when it decided:

> "whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 259.) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, §534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board * * * Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter

claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United States * * *" (R. 108-109).

We have proved in our main brief, No. 783, under Points II and III that the State law does not contravene the Federal Constitution (Article III, §2), and that the provisions of the Federal Unemployment Tax Act exempting the service of an officer or member of the crew from the Federal tax imposed by that statute do not oust the State from jurisdiction.

Only in the event therefore that this Court holds that the Federal constitution prevents the exercise of the State's jurisdiction will it be necessary to consider the application of the "locality doctrine" in support of the order appealed from.

Examining the situation solely upon the basis of the "locality doctrine," without thereby conceding the necessity of its application, then surely the record herein reveals that the appellant was engaged in a matter purely of local concern. The City of New York was engaged in improving its system of parks. It is difficult to think of any situation more local in character than such an activity. There was nothing inherent in the nature of the work of Cassaretakis to make it navigational in character. Rather, as we have shown, it was incidental to construction and stevedoring operations. During his working hours, the dredge was working from a fixed location. Among other things, when his work was over he was free to suit his own convenience whether to sleep on the dredge or go ashore for the night.

A tax based upon his employment is purely a local matter, in no way prejudicing the general uniformity of the maritime law.

CONCLUSION.

The Order Appealed From Should be Affirmed.

Dated: Albany, N. Y., April 28, 1943.

Respectfully submitted,

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